UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
LESLIE B. REYNOLDS	)	CASE NO. 0A5-62347-MHM
	)	
Debtor	)	
	)	
WILLIS ORLANDO RYAN	)	
CRISTA M. RYAN	)	
	)	**ADVERSARY PROCEEDING**
Plaintiff	)	**NO. 05-9078**
v.	)	
	)	
LESLIE B. REYNOLDS	)	
	)	
Defendant	)	

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Before the court is Plaintiffs' motion for summary judgment. Plaintiffs assert the judgment they obtained against Debtor in state court entitles them to a judgment of nondischargeability under §523(a)(4) or (6). Debtor opposes the motion. For the reasons set forth below, the motion is denied.

The material facts are undisputed. In 2001, Plaintiffs were sued in the State Court of Cobb County by Plymarts, Inc. ("Plymarts"), Civil Action File No. 01-A6997-6 (the "Lawsuit"). Plymarts sought to collect from Plaintiffs $25,798.81, plus interest and attorneys fees, on an unpaid account. In the Lawsuit, Plaintiffs filed a third-party complaint against Debtor and Debtor's construction company (collectively "Debtor") alleging breach of contract and conversion.

The Lawsuit had arisen as a result of the contract between Debtor and Plaintiffs for Debtor to construct a residence for Plaintiffs. In connection with that contract, Plaintiffs had paid Debtor certain periodic payments intended to be used by Debtor to pay subcontractors and suppliers. Plymarts sought payment for certain supplies which had been provided for the construction project. In the third-party complaint against Debtor, Plaintiffs alleged that Debtor had breached the contract which required him to pay for supplies or, alternatively, that Debtor had converted funds paid to Debtor by Plaintiffs to his own use.

Debtor filed an answer to the third-party complaint, but then apparently failed to respond to discovery requests. As a result of Debtor's failure to participate in discovery, Debtor's answer was stricken. On December 13, 2004, Plymarts obtained a judgment against Plaintiffs in the amount of $46,623.54, which included contractual 18% interest and 15% attorneys fees. The following day, judgment was entered in favor of Plaintiffs against Debtor in the amount of $51,966.14, which represents the $46,623.54 awarded to Plymarts plus $5,342.60 litigation costs.

Plaintiffs assert that the judgment could only have been based upon a finding by the state court of conversion, rather than breach of contract,[1] and thus, Debtor is collaterally estopped from relitigating the basis of Plaintiffs' claim against him. Plaintiffs also assert that the conversion claim is nondischargeable under §523(a)(4) or (6). Debtor contends that collateral estoppel cannot apply because the judgment, which recites none of the underlying facts or the legal basis for the judgment and thus does not foreclose the

[1] Apparently Plaintiffs concede that they would have no grounds to seek nondischargeability of a simple breach of contract claim.

possibility that it was based on simple breach of contract, cannot preclude litigation of the dischargeability of Plaintiffs' claim.

DISCUSSION

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.,* 929 F. 2d 604 (11th Cir. 1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.; Rollins v. TechSouth, Inc.,* 833 F. 2d 1525 (11th Cir. 1987). Where contradictory inferences may be drawn from undisputed evidentiary facts, summary judgment is usually inappropriate. *Nunez v. Superior Oil Co.,* 572 F. 2d 1119 (5th Cir. 1978);[2] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

In this proceeding, Plaintiffs assert that the judgment entered against Debtor collaterally estops Debtor from relitigating the nature of Plaintiffs' claim. In determining whether collateral estoppel applies to preclude litigation of certain issues in a subsequent proceeding, if the prior judgment was rendered by a state court, the collateral estoppel law of that state must be applied. *St. Laurent v. Ambrose,* 991 F.2d 672, 675-76 (11th Cir.1993). Under Georgia collateral estoppel law, the issue at stake must be identical to

[2] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

the issue in the prior litigation; that issue must have been actually and necessarily litigated in the prior litigation; and the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior litigation. *Moore v. Gill*, 181 B.R. 666 (Bankr. N.D. Ga. 1995)(J. Drake).

Plaintiffs apparently recognize that the critical issue in determining whether collateral estoppel can be applied in this proceeding is whether the issue in this proceeding is identical to the issue in the prior state court litigation. Plaintiffs assert two facts as critical to the conclusion that the judgment in the prior proceeding must have been based upon a finding of conversion rather than breach of contract. One is that, in the answer to the third-party complaint, Debtor raised the issue of mitigation, but the judgment evidences no consideration of such defense. Plaintiffs assert mitigation is a defense allowed in a contract action but not an action on an intentional tort, such as conversion. O.C.G.A. §13-6-5 and §51-12-11. Plaintiffs' argument is unpersuasive, however. The court could have based its judgment on a finding of breach of contract, concluding that, because the burden of proof in a mitigation defense is on the party asserting it, Debtor's mitigation defense had been necessarily abandoned when the answer was stricken. Alternatively, the court could have discounted Debtor's mitigation defense, which is apparently based upon the argument that Plaintiffs could have avoided interest and late charges by simply paying Plymarts, finding the suggested mitigation unreasonable under the circumstances. *See Reid v. Whisenant*, 161 Ga. 503 (1926).

The other fact on which Plaintiffs base their argument that the judgment must have been based upon conversion is that a contract claim would not have supported the 18% interest and 15% attorneys fees awarded to Plymarts against Plaintiffs and thence to Plaintiffs against Debtor. Plaintiffs rely on the provision in the Georgia Code, O.C.G.A. §13-2-6, that contract damages are limited to damages that arise naturally and as contemplated by the parties. Plaintiffs did not offer any evidence regarding the provisions of the contract between Plaintiffs and Debtor. Nevertheless, the amounts owed to Plymarts appear to have arisen naturally and in accordance with the provisions of Debtor's account with Plymarts, its materialman's lien, and the resulting action against Plaintiffs as homeowners; it seems unlikely those elements of damages would be surprising to a building contractor.

Plaintiffs also seem to place emphasis on the deemed admission of conversion by Debtor, which resulted from Debtor's failure to respond to Plaintiffs' requests for admission in the state court litigation. It seems an interesting contradiction that Plaintiffs relied on Debtor's failure to respond to discovery, including reports for admissions, to have Debtor's answer stricken, which in turn allowed Plaintiffs to obtain essentially a default judgment against Debtor, but then, on the other hand, attempt to skewer Debtor in this dischargeability proceeding with a deemed admission. Nevertheless, the state court judgment itself contains no suggestion that the court relied upon Debtor's admission to

conversion.[3] Indeed, a contrary suggestion could be hypothesized, for if the state court relied upon a finding that Debtor had committed an intentional tort, conversion, some additional element of damages, such as punitive damages, might have been considered or awarded.[4]

Finally, even if this court were convinced that the state court judgment was based upon a finding that Debtor's conduct constituted conversion, it does not necessarily follow that Plaintiffs' claim is nondischargeable under §523(a)(4) or (6). Pursuant to 11 U.S.C. §523(a)(4), a debt based on "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" is nondischargeable. Plaintiffs do not suggest any fiduciary relationship between Debtor and Plaintiffs. The second part of §523(a)(4), however, encompasses embezzlement and larceny. The terms embezzlement and larceny are not modified by the requirement of fiduciary capacity. *Mullis v Walker*, 7 BR 563, 564 (Bankr. M.D.Ga. l980). The definitions of larceny and embezzlement in §523(a)(4) are to be determined under federal common law. *Kaye v. Rose,* 934 F. 2d 901 (7th Cir. 1991; *Klemens v. Wallace,* 840 F. 2d 762 (10th Cir. 1988); *Weinreich v. Langworthy,* 121 B.R. 903 (Bankr. M.D. Fla. 1990); *Allstate Life Insurance Co. v. Guerrerio*, 143 B.R. 605 (Bankr. S.D. N.Y. 1992); *Clarendon National Insurance Co. v. Barrett,* 156 B.R. 529

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[3] Plaintiffs did not provide a copy of the motion filed in the state court that resulted in the judgment against Debtor. Plaintiffs' attorney includes in his affidavit what purports to be a description of matters the state court considered in deliberations subsequent to the hearing, but provided no evidence to support the competence of Plaintiffs' attorney to testify regarding the court's post-hearing deliberations.

[4] Plaintiffs do not explain the legal basis for the award of litigation expenses. Facially, that award appears more in the nature of contract damages than tort damages.

(Bankr. N.D. Tex. 1993); *Great American Insurance Co. v. Graziano,* 35 B.R. 589 (Bankr. E.D.N.Y. 1983). Embezzlement has been defined as the "fraudulent appropriation of property by a person to whom such property has been lawfully entrusted or into whose hands it has lawfully come." *Moore v. U.S.,* 160 U.S. 268, 269 (1895). Larceny under federal common law is "the felonious taking of another's personal property with intent to convert it or deprive the owner of the same." *Langworthy,* 121 B.R. at 907. "[L]arceny is proven if the debtor has wrongfully and with fraudulent intent taken property from its owner." *Guerrerio,* 143 B.R. at 610. Neither of these is proved.

Conversion is defined under Georgia law as the unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to the owner's rights. *Lucas v. Durrence*, 25 Ga. App. 264, 102 S.E. 36 (1920); *Parks v. Multimedia Technologies, Inc.* 239 Ga. App. 282, 520 S.E. 2d 517 (1999). To make a *prima facie* case of conversion, a plaintiff must show title to the property, possession by the defendant, demand for possession and refusal to surrender. *Taylor v. Powertel, Inc.*, 250 Ga. App. 356, 551 S.E. 2d 765 (2001). Conversion does not appear to include any element of fraud or deception, as required in larceny or embezzlement. Therefore, a conclusion that the state court judgment against Debtor was based upon a finding of conversion would not necessarily result in a conclusion of nondischargeability under §523(a)(4).

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. Pursuant

to *Kawaauhau v. Geiger,* 118 S.Ct. 974 (1998), debts arising from recklessly or negligently inflicted injuries do not fall within the willful and malicious injury exception to discharge. "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Id.* at 977. *Kawaauhau* overrules previous Eleventh Circuit precedent to the extent that it would support a finding of nondischargeability for acts by a debtor other than acts committed with the intent to cause injury. *Florida Outdoor Equipment, Inc. v. Tomlinson,* 220 B.R. 134 (Bankr. M.D. Fla. 1998). Consequently, *Hope v. Walker*, 48 F. 3d 1161 (11th Cir. 1995), *Wolfson v. Equine Capital Corp.,* 56 F. 3d 52 (11th Cir. 1995), and *Chrysler Credit Corp. v. Rebhan,* 842 F. 2d 1257 (11th Cir. 1988), cases Plaintiffs relied upon, are effectively overruled. Therefore, a conclusion that the state court judgment against Debtor was based upon a finding of conversion, without more, would not necessarily result in a conclusion of nondischargeability under §523(a)(6). Accordingly, it is hereby

ORDERED that Plaintiffs' motion for summary judgment is denied.

IT IS SO ORDERED, this the ____ day of May, 2006.

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MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE